

FILED
JAN 15 2009
By PATRICK E. DUFFY, CLERK
DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

LENORA DAVIS BATEMAN, VICKI)	CV 08-96-M-DWM
EARHART, CAROL HEALD, IVAN KAYS,)	
THERESA YOUNGQUIST, BARBARA)	
GAUSTAD, SHARON YOUNG, DIANE)	
MOLES, KYLE BAILEY, MIKE BRIGGS,)	
MARK RADEMAN, DREW OLSEN and)	
CHADNEY SAWYER,)	
)	
Plaintiffs,)	
)	
vs.)	ORDER
)	
NATIONAL UNION FIRE INSURANCE)	
COMPANY OF PITTSBURGH,)	
PENNSYLVANIA and FEDERAL)	
INSURANCE COMPANY,)	
)	
Defendants.)	

United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendation in this matter on December 4, 2008. Judge Lynch recommended dismissing Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b) for lack of jurisdiction. Plaintiffs did not object and so have waived the right to de novo review of the record. 28 U.S.C. § 636(b)(1). This Court will

review the Findings and Recommendation for clear error.

McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000).

Plaintiffs' Amended Complaint asserts claims against National Union Fire Insurance ("National Union") and Federal Insurance Company under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. National Union moved to dismiss the complaint because, inter alia, it does not present an actual case or controversy. See Principal Life Ins. Co. V. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). Judge Lynch found that Count 2 of the Amended Complaint, which is the only claim against National Union, does not present an actual case or controversy because it requests an advisory opinion stating that National Union must follow the applicable law. I find no clear error in Judge Lynch's findings and recommendations.

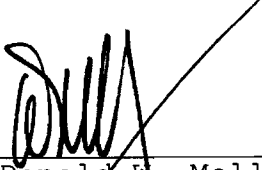
While Plaintiffs do not object to Judge Lynch's findings and recommendation, they request that the Court dismiss the complaint without prejudice. Plaintiffs assert that National Union has committed on-going violations of Montana's Unfair Trade Practices Act (UTPA). Judge Lynch's recommendation does not specify whether the claim should be dismissed without prejudice. If

Plaintiffs allegations are true, it is possible they could assert a claim against National Union for violations of UTPA in the future. Dismissal without prejudice is appropriate.

Accordingly,

IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendation (dkt #41) are adopted in full. Defendants' motion to dismiss (dkt #25) is GRANTED and Count 2 of Plaintiffs' amended complaint is DISMISSED WITHOUT PREJUDICE.

Dated this 15th day of January, 2009.



Donald W. Molloy, District Judge
United States District Court

